Office-Supreme Court, U.S.
FILED
JUL 24 1981
ALEXANDER L. STEVAS,
CLERK

No. 80-2153

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

DR. J.B. KENLEY, *et al.*,

Petitioners,

v.

WILLIE E. YOUNG,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF IN OPPOSITION

BRENT E. SIMMONS*
806 15th Street, N.W.
Suite 940
Washington, D.C. 20005
(202) 638-3278

CHARLES M.L. MANGUM
LEONARD L. BROWN, JR.
P.O. Box 1232
522 Jackson Street
Lynchburg, Virginia 24504
(804) 845-3431

JACK GREENBERG
JAMES M. NABRIT, III
Suite 2030
10 Columbus Circle
New York, New York 10019
(212) 586-8397

Attorneys for Respondent

* Counsel of Record

QUESTIONS PRESENTED

1. Does the First Circuit's decision in Nadeau v. Helgemoe, 581 F.2d 275 (1st Cir. 1978) conflict with the Fourth Circuit's decision in Bonnes v. Long, 599 F.2d 1316 (4th Cir. 1979), with respect to determining a "prevailing party" under federal civil rights attorneys fees statutes where the suit is terminated by a settlement.

2. Did the Fourth Circuit correctly find that plaintiffs' suit was neither frivolous nor involved "special circumstances" in reversing the district court's abuse of discretion in denying an award of attorney's fees.

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES.....	iii
STATEMENT OF THE CASE	1
REASONS FOR DENYING THE WRIT.....	4
I. This Case Presents No Conflict Between Circuit Courts Concerning the Definition of a Prevailing Party Under Civil Rights Statutes Where A Suit Is Terminated By A Settlement.....	4
II. Plaintiff's Suit Was Not Frivolous, But Was Essential To Recovery of Relief For Denial of Promotional Opportunity and Was Causally Related to The Benefits Received at Settlement ..	10
CONCLUSION.....	12

TABLE OF AUTHORITIES

Page

Cases

Bonnes v. Long, 599 F.2d 1316 (4th Cir. 1979)..... 9,10

Nadeau v. Helgemoe, 581 F.2d 275 (1st Cir. 1978)..... 5,6,9

Taylor v. Safeway Stores, Inc., 524 F.2d 263 (10th Cir. 1975)..... 7,8

Teamsters v. United States, 431 U.S. 324 (1977)..... 11

Young v. Kenley, 641 F.2d 192 (4th Cir. 1981)..... 12

Young v. Kenley, 465 F. Supp. 1260 (E.D. Va. 1979)..... 11

No. 80-2153

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1980

==========

DR. J.B. KENLEY, et al.,

Petitioners,

v.

WILLIE E. YOUNG,

Respondent.

==========

Petition For Writ of Certiorari to
The United States Court of Appeals
For The Fourth Circuit

==========

BRIEF IN OPPOSITION

==========

STATEMENT OF THE CASE

Respondent, Mrs. Willie Young, filed two separate administrative complaints against Petitioners. The first, filed on December 23, 1974 with the Equal Employment

Opportunity Coordinator for the State of Virginia, resulted in her promotion to Public Health Nurse Grade Level B. Petitioner Sayres acknowledged in a memorandum dated February 3, 1975, that the State's Bureau of Nursing had been "negligent" in not crediting Respondent's prior experience in public health nursing in the State of New York.

Respondent's second administrative complaint was based on two other memoranda -- dated June 13, 1974 and March 3, 1975 -- both of which stated that Respondent would be ineligible for promotion to supervisory level Public Health Nurse "C". At least one of the memoranda was placed in her personnel file. Both memoranda effectively constituted a permanent bar to Respondent's promotion, until the promotional requirements were themselves changed

in February, 1977, two years later. Mrs. Young complained and on June 20, 1975 filed with the Equal Employment Opportunity Commission. Petitioners were duly notified of the EEOC charge on June 30, 1975.

Subsequent to filing her charge, the EEOC "lost" Mrs. Young's file. She made repeated requests for a Notice of Right to Sue and finally initiated her suit in January 1978, the statutory period of 180 days having long since passed. The EEOC, however, did finally issue a Notice of Right to Sue on May 2, 1978.

Notwithstanding the change in promotional requirements in February, 1977, Mrs. Young's EEOC charge remained pending; the memorandum barring her promotion remained in her file; and, as alleged in her complaint, Mrs. Young was qualified for the position of Public Health Nurse "C" since

the date of her employment in 1973. The new requirements of February 1977, while making her eligible as of that date, did not provide for retroactive promotion or other relief.

REASONS FOR DENYING THE WRIT OF CERTIORARI

I. This Case Presents No Conflict Between Circuit Courts Concerning the Definition of a Prevailing Party Under Civil Rights Statutes Where a Suit Is Terminated by a Settlement

Petitioners argue that the First and Fourth Circuits have articulated "different" tests to determine whether a plaintiff is to be considered a prevailing party. Petition for Writ of Certiorari, at 12. Different tests, however, are not necessarily conflicting tests and petitioners have failed to show actual conflict sufficient to warrant this Court's invocation of jurisdiction under United States Supreme Court Rule 17.1(a). Conflict

between Circuits is not established merely because different outcomes are possible on the facts of a single case, even though "different" tests were utilized.

More importantly, there is no conflict between Circuits since the "two-prong test" being advanced by Petitioners simply does not apply to suits terminated by settlements, as was plainly stated by the First Circuit itself in Nadeau v. Helgemoe, 581 F.2d 275 (1st Cir. 1975). In Nadeau, plaintiffs had succeeded with respect to a claim for greater access to prison library facilities, but their cause had been remanded for further trial concerning other conditions of confinement. Before trial resumed, however, a consent decree was entered. Attorneys' fees were denied by the district court and the matter was again brought before the First Circuit, resulting

in the opinion on which Petitioners now rely.

> As the First Circuit noted in Nadeau: In the present case the legal issues were still in dispute at the time the consent decree was signed and there has never been a final judicial determination of whether or not defendant deprived plaintiffs of their constitutional rights. (Emphasis added).

581 F.2d at 280. The "two-prong test" relied upon by the district court in the present action is included in the following dicta from Nadeau:

> Even if plaintiffs can establish that their suit was causally related to the defendants' actions which improved their condition, this is only half of their battle. The test they must pass is legal as well as factual. If it has been judicially determined that defendant's conduct however beneficial it may be to plaintiffs' interests, is not required by law, then defendants must be held to have acted gratuitously and plaintiffs have not prevailed in a

> legal sense. See Taylor v. Safeway Stores, Inc., supra. In the present case ... there has not yet been a judicial determination of whether plaintiffs' rights were violated under traditional standards of analysis. (Emphasis added).

581 F.2d at 281. The First Circuit plainly held that the "two-prong" test above cited did not apply to the case before it -- nor does it apply to the present action -- because the matter had settled prior to a final judicial determination of the disputed legal issues.

The point is further clarified by reference to the cited case of Taylor v. Safeway Stores, Inc., 524 F.2d 263 (10th Cir. 1975). There, following a full trial, the court had ruled that plaintiff had failed to prove a pattern of class-wide discrimination. A short time after the suit, the defendant employer initiated a new affirmative action program. The

plaintiff went back to court seeking an award of fees, arguing that his suit was the catalyst behind the defendant's new affirmative action program. The Tenth Circuit held that since no legal liability had been established at trial against the defendant, his actions were gratuitous and fees were therefore denied. Taylor is, of course, readily distinguishable from the facts in Nadeau and the present action where both suits were terminated prior to a final judicial determination of the legal issues.[1/]

1/ The First Circuit in Nadeau went on to state that where a court has had "sufficient exposure to the facts and law of the case" it can "determine" if the action is frivolous and cites Christiansburg Garment Co. v. EEOC, 434 U.S. 412 (1978). This Court is not being called upon to consider that dubious holding. The district court in the present action, however, was clearly erroneous in its reformulation of the Nadeau standard: "The Court has had suffi-

On the other hand, the First Circuit did hold: "we conclude that plaintiffs may be considered 'prevailing parties' for attorney's fees purposes if they succeed on any significant issue in litigation which achieves some of the benefits the parties sought in bringing suit". Nadeau, 581 F.2d at 279. The Fourth Circuit in Bonnes v. Long, 599 F.2d 1316, 1318 (4th cir. 1979), in fact cites Nadeau on that very point.

1/ continued

cient exposure to the facts and law of this case to determine that this case clearly has not been proved". (Emphasis added). See Appendix D to Petition, pp. 13-14. It is entirely inappropriate for a court to go forward to a judgment on the merits of a claim after the suit has settled. See Flinn v. FMC Corp., 528 F.2d 1169, 1172-3 (4th Cir. 1975); Pettway v. American Cast Iron Pipe Co., 576 F.2d 1157, 1169, 1214 n. 69 (5th Cir. 1978); Cotton v. Hinton, 559 F.2d 1326 (5th Cir. 1977); City of Detroit v. Grinnel Corp., 495 F.2d 448, 456 (2nd Cir. 1974); Grunin v. International House of Pancakes, 513 F.2d 114, 123 (8th Cir. 1975).

The Fourth Circuit goes on to state that the appropriate inquiry is a pragmatic one which turns on whether or not "the plaintiff fee claimant's efforts (in filing suit) contributed in a significant way" to "an actual conferral of benefit or relief from burden". 599 F.2d at 1319. Thus, the Fourth Circuit actually considered and relied on the First Circuit's holding in Nadeau in formulating the Bonnes test.

There being no conflict between the two circuits the petition for a writ of certiorari should be denied.

II. Plaintiff's Suit Was Not Frivolous, But Was Essential To Recovery of Relief For Denial of Promotional Opportunity And Was Causally Related to The Benefits Received At Settlement

Petitioners allege that had Mrs. Young applied for promotion at any point after February 1977, she would have been promoted and her suit need never have been filed.

Petitioners totally ignore the fact that Mrs. Young had filed an administrative complaint against the written bar to her promotion two years prior to February, 1977. Given that express bar, Mrs. Young was under no duty to engage in the "futile gesture" of filing an application for promotion. Teamsters v. United States, 431 U.S. 324, 366 (1977).

The district court in its first decision of March 1, 1979 was compelled to note:

> the Court cannot say plaintiff's law suit was completely superfluous in bringing about the benefits she received. Without her suit, plaintiff would have received neither the award of back pay nor the reclassification of her job in Bedford to permit her to accept a promotion and still remain in Bedford.

Young v. Kenley, 465 F. Supp. 1260 (E.D. Va. 1979); Petition Appendix D, at 12. The Fourth Circuit noted that these same

benefits were derived as part of the "compromise ... integral to settlement" and that they were "causally related" to the lawsuit. Young v. Kenley, 641 F.2d 192 (4th Cir. 1981); Petition Appendix A, at 11 and 12.

The Fourth Circuit correctly ruled that Mrs. Young's suit was not frivolous and that there were no "special circumstances" on which to deny an award of attorney's fees.

CONCLUSION

On the basis of the foregoing the petition for writ of certiorari in this case should be denied.

Respectfully submitted,

BRENT E. SIMMONS*
806 15th Street, N.W.
Suite 940
Washington, D.C. 20005
(202) 638-3278

CHARLES M.L. MANGUM
LEONARD L. BROWN, JR.
P.O. Box 1232
522 Jackson Street
Lynchburg, Virginia 24504
(804) 845-3431

JACK GREENBERG
JAMES M. NABRIT, III
Suite 2030
10 Columbus Circle
New York, New York 10019
(212) 586-8397

Attorneys for Respondent

* Counsel of Record